IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. .....

MARTIN L. SWEENEY, *Petitioner*,

v.

ELEANOR M. PATTERSON, Trading as the Washington Times-Herald, DREW PEARSON and ROBERT S. ALLEN.

SUPPORTING BRIEF.

To the Honorable, the Supreme Court of the United States:

I.

OPINIONS OF THE COURTS BELOW.

No opinion was entered by the District Court, its order dismissing petitioner's cause of action appears in the record at page 16; the opinion of the Court of Appeals for the District of Columbia was handed down on May 25, 1942, and is reported at 128 F. 2d 457, and appears in the record at pages 18 to 20. Judgment affirming the action of the District Court was entered on the same day (R. 21). The petition for rehearing was denied on June 30, 1942 (R. 31).

II.

JURISDICTION.

Jurisdiction is conferred on the Supreme Court by Section 240(a) of the Judicial Code, as amended (28 U. S. C. A. 347(a)). Jurisdiction is invoked on the grounds:

(a) The Court of Appeals for the District of Columbia has decided a question of paramount importance not only for its alarming effect on all public officials but for its general significance in the highly controversial field of the law of libel as well.

(b) A decision by this Court will have a determinative effect on litigation presently pending in a number of Courts and involving the publication of the identical article as here in issue. The result would accomplish a "just, speedy, and inexpensive determination of every action", as contemplated by the spirit and letter of the rules of civil procedure for district courts as recently promulgated by this Court.

(c) The opinion of the Court of Appeals is in conflict not only with all applicable local decisions but also with decisions of this Court and with the rule as announced by the Court of Appeals for the Second Circuit and as affirmed by this Court in a substantially identical case.

III.

STATEMENT OF THE CASE.

The facts set forth in the statement contained in the petition are sufficient for the purposes of the brief, and for the purposes of brevity are not repeated here.

IV.

SPECIFICATIONS OF ERROR.

1. The Court of Appeals erred in failing to hold that the published article was libelous *per se*.

2. The Court of Appeals erred in interpreting the accusations to connote less than *gross* immorality or *gross* incompetence.

3. The Court of Appeals erred in assuming that anyone, including respondents, may defend an interest by hurling false and disgraceful statements of fact at a public official, *because he is a public official.*

4. The Court of Appeals erred in holding that false, injurious and disgraceful statements of fact, when charged to a public official, are unredressable unless there is a showing of economic loss.

5. The Court of Appeals erred in failing to take proper cognizance of decisions of this Court and of an opinion of the Second Circuit Court of Appeals, as affirmed by this Court, which involved substantially the same article.

6. The Court of Appeals erred in failing to reverse the District Court and send the cause back for trial on the merits.

ARGUMENT.

I.

The Publication Falsely Accuses Petitioner of Religious and Racial Hatred in His Official Office.

(a) Unambiguous meaning of the words complained of.

The article charges petitioner with being a part of "a hot behind-the-scenes fight" in Congress "to prevent the appointment of a Jewish judge"; the proposed appointee being one Emerich Burt Freed who was "on the verge of being elevated to the U. S. District Court"; that Congressman Sweeney's "violent opposition" had been aroused, and the

"basis" of his opposition was the *fact* that "Freed is a Jew, and one not born in the United States". After reciting these *statements of fact,* the article concludes with the further *statement of fact* that, "Irate, Representative Sweeney is endeavoring to call a caucus of Ohio Representatives December 28 to protest against Freed's appointment." (R. 5-6.)

As is readily seen, the alleged reasons advanced for petitioner's opposition to Freed were not that the candidate was unqualified for office, but squarely on the point that *he was a Jew and a Jew not born in this country.*

The inescapable import of the words is that petitioner opposed the appointment of a man because he was a Jew. Whether the word "Jew" was intended by the respondents to mean the race or the religion is unimportant. The term is unqualified and in ordinary common parlance is accepted to mean either race or religion, or both. The natural and normal inference to be drawn from the fact that a man is opposed to the appointment of a person to office because that person is a Jew, is that such man is prejudiced against Jews, is bigoted, or dislikes Jews because they are Jews,—or, in everyday language, he is a "Jew-hater." It is to be noted that the opposition of Mr. Sweeney is said to be "violent", indicating that his prejudice, bigotry and hatred are fanatically severe.

(b) Religious and racial intolerance condemned by all right-thinking people.

In refusing to consider the above publication of disgraceful facts, to constitute words *per se* actionable, the Court of Appeals observed that "political conduct and views which some respectable people approve, and others condemn, are constantly imputed to Congressmen." We have searched in vain not only the judicial decisions, but the public periodicals for an indication that "some respectable people approve" of anti-Semitism and our research only tends to unqualifiedly reject as error such an assumption.

Circuit Judge Chase in *Sweeney* v. *Schenectady Union Pub. Co.*, (C. C. A. 2d), 122 F. 2d 288, 290, affirmed —— U. S. ——, 86 L. Ed. 867; rehearing denied —— U. S. ——, 86 L. Ed. 1023, recognized that some people might approve of anti-Semitism, but it is clear from the following that such people could not be termed "respectable":

> "This plaintiff by being accused of trying to deprive a man of an appointment to public office because, presumably both in race and religion, he was Jewish would, intolerance being what it is, no doubt gain approval and increased respect in some quarters; and in others where only the hit bird flutters, there would be indifference; but in a country still dedicated to religious and racial freedom decent, liberty-loving people still are present in great numbers and still are greatly offended by the narrow-minded injustice of bigots who see individuals only en masse and condemn them merely because their ancestors were of a certain race or they themselves are of a certain religion. Those who hate intolerance are prone to regard the person who believes in and practices acts of intolerance with aversion and contempt. And in these times when it is universal knowledge that one foreign dictator gained his power by practices which included large-scale, unreasonable Jewish persecutions which have played an important part in making his name an anathema in many parts of this country the publication of statements such as those alleged may well gain for the person falsely accused the scorn and contempt of the right-thinking in appreciable numbers."

The effects of a charge of religious and racial bigotry—at least in this country—is a matter of universal knowledge. All the common modes of expression have been enlisted to denounce, and rightfully so, the intolerant. One concrete example appears in a recent and widely circulated article entitled "What We Are Fighting For," written by Mrs. Franklin D. Roosevelt, (American Magazine, July 1942, Page 16). Of the reasons we are fighting the present war, Mrs. Roosevelt, a representative citizen, states one as being "Freedom from racial and religious discrimination."

If religious and racial discrimination is not considered by the public as "grossly immoral", why would we be involved in a mortal struggle to help to eradicate it?

(c) Liability is not a question of majority vote.

But, assuming that, as Judge Chase stated, "intolerance being what it is," some might not disapprove of the false accusations, this would still not relieve the respondents from liability.

As was stated by Mr. Justice Holmes, speaking for this Court in *Peck* v. *Tribune Co.*, 214 U. S. 185, 190:

> "Liability is not a question of majority vote, * * * obviously an unprivileged falsehood need not entail universal hatred to constitute a cause of action. No falsehood is thought about, or even known by all the world. No conduct is hated by all. That it will be known by a large number, and will lead an appreciable fraction of that number to regard the plaintiff with contempt, is enough to do her practical harm * * *."

Directly in point with the case at bar, where petitioner has been deprived of a trial by jury, Mr. Justice Holmes, in the *Peck* case said:

> "It seems to us impossible to say that the obvious tendency of what is imputed to the plaintiff by this advertisement is not seriously to hurt her standing with a considerable and respectable class in the community. Therefore it was the plaintiff's right to prove her case and go to the jury, and the defendant would have got all that it could ask if it had been permitted to persuade them, if it could, to take a contrary view." (Citing cases.)

The Court of Appeals for the District of Columbia as recently as 1938, recognized and approved the doctrine enunciated by this Court in the *Peck* case. In *Meyerson* v. *Hurlbut, et al.*, 68 App. D. C. 360, an action for slander growing out of a charge that the plaintiff, a dealer in automotive

parts, had been accused of "price-cutting," Mr. Justice Edgerton (who wrote the opinion in the instant case) stated:

> "It is true that price-cutting is common and that there is no consensus against it, * * *"

but, in applying the rule laid down in *Peck* v. *Tribune Co.*, 214 U. S. 185, 190, the decision of Mr. Justice Holmes, was quoted at length and the trial court was reversed on the ground that the slander was actionable *per se*, although it was conceded that all persons might not regard a charge of being a "price-cutter" as slanderous.

II.

If the Publication Can Possibly Carry an Innocent as Well as a Disgraceful Meaning, the Question is for the Jury.

Moreover, if there be any doubt as to the libelous quality of a publication, the question becomes one for the jury to decide, and it was so held in *Meyerson* v. *Hurlbut, et al.*, 68 App. D. C. 360, where again Mr. Justice Edgerton stated:

> "If language is capable of two meanings, one of which would be libelous and actionable and the other not, it is for the jury to say under all the circumstances surrounding its publication, including extraneous facts admissable in evidence, which of the two meanings would be attributed to it by those to whom it is addressed, or by whom it may be read."

And,

> "It is only when the court can say that the publication is not reasonably capable of any defamatory meaning and cannot be reasonably understood in any defamatory sense, that the court can rule, as a matter of law, that the publication is not libelous."

Yet, the same court in an opinion written by the same jurist concludes that a *false* charge of anti-Semitism, hurled nation-wide at a public official while performing his official duties, is of so light a nature as to preclude any possibility

of the words being libelous unless an economic loss was shown! The Court of Appeals ignored completely the principles expounded by this Court in the *Peck* case.

This, notwithstanding the existence of the President's Committee on Fair Employment Practice and numerous other committees and associations founded in recent years to combat religious and racial intolerance!

It may also be noted that the *Meyerson* case involved only a charge of oral defamation, always recognized as the lesser of the evils of libel and slander. Again, the Court of Appeals has not followed the guidance of this Court in another respect. The fundamental distinction in the law of libel overlooked by the Court of Appeals was pointed out by Mr. Justice Clifford in *Pollard* v. *Lyon*, 91 U. S. 225, 228, wherein he said:

> "* * * there is a marked distinction between slander and libel and that many things are actionable when written or printed and published which would not be actionable if merely spoken, * * *"

Again, in *White* v. *Nicholls, et al.*, 44 U. S. 266, Mr. Justice Daniel, speaking for the court, said:

> "With regard to that species of defamation which is effected by writing or printing, or by pictures and signs, and which is technically denominated libel, although in general the rules applicable to it are the same which apply to verbal slander, yet in other respects it is treated with a sterner rigor than the latter; because it must have been effected with coolness and deliberation, and must be more permanent and extensive in its operation than words, which are frequently the offspring of sudden gusts of passion, and soon may be buried in oblivion."

See also, Mr. Justice Cardozo's opinion in *Ostrowe* v. *Lee*, 256 N. Y. 36.

III.

The Rule Enunciated by the Court of Appeals is Contrary to All Applicable Local Decisions, and is in Conflict with the Overwhelming Weight of Authority in this Country as Well as England.

(a) The established local law Disregarded.

It has long been held that any written or printed statement or article published of or concerning another, which is false and tends to injure his reputation, and thereby expose him to public hatred, contempt, scorn, obloquy, or shame, is libelous *per se.*

> "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to defer third persons from associating or dealing with him." *Restatement of the Law of Torts,* Vol. 3, Sec. 559.

In the matter of libels on public officials, it is said:

> "Words charging misconduct in office, want of official integrity or fidelity to public trust, words inconsistent with the due fulfillment of official duty, words which tend to deprive an official of his office, and words which are likely to produce public contempt and the reprobation of right minded men are libelous per se." L. R. A. 1918, E. P. 23.

Of the number of suits brought by your petition in other jurisdictions and all stemming from substantially the identical publication as here in issue, the various courts, where the question of liability was tested, have evidenced a difference of opinion as to the libelous quality of the words complained of. This case is, however, governed by the law of the District of Columbia. *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64.

With unvarying consistency the courts of this jurisdiction have followed the great weight of authority in holding that words published falsely which tend to expose the individual,

whether he be public official or private citizen, to any of the evil results catalogued in the general statements above are libelous *per se.* See *Lane* v. *Washington Daily News,* 66 App. D. C. 245; *Washington Times Co.* v. *Bonner,* 66 App. D. C. 280; *A. S. Abell Co.* v. *Ingham,* 43 App. D. C. 582; *Ashford* v. *Evening Star Newspaper Co.,* 41 App. D. C. 395; *Washington Herald Co.* v. *Berry,* 41 App. D. C. 322; *Poston* v. *Washington A. & Mt. V. R. Co.,* 36 App. D. C. 359; *Russel* v. *Washington Post Co.,* 31 App. D. C. 277; *Washington Gaslight Co.* v. *Lansden,* 9 App. D. C. 508; *Bailey* v. *Holland,* 7 App. D. C. 184.

A publication which is claimed to be defamatory must be read in the sense in which readers to whom it is addressed would ordinarily understand it. *Lane* v. *Washington Daily News,* 66 App. D. C. 245; *Meyerson* v. *Hurlbut,* 68 App. D. C. 360.

And, where a publication is libelous on its face, the action is maintainable without either allegation or proof of special damages.

> "It is elementary that in such event special damages neither be alleged nor proved. The law presumes some damage." *Washington Times Co.* v. *Bonner,* 66 App. D. C. 280, and cases there cited.

The Court of Appeals for the District of Columbia, as far back as 1895, took cognizance of the implied damage resulting in a false charge of racial antipathy. In *Bailey* v. *Holland,* 7 App. D. C. 184, the court held that a letter, accusing a colored government employee of treachery to his race, and of working against their interest, written to a senator to whom he owed his appointment, was libelous *per se.*

The recent decision in *Washington Times Co.* v. *Bonner,* (1936), 66 App. D. C. 280, aptly illustrates the law of libel as it has heretofore existed in the District of Columbia—at least until the present decision by the Court of Appeals. In the *Bonner* case, the plaintiff was a public official—Executive Secretary of the Federal Power Commission. There

were five separate publications in issue and *each of which* the court sustained as warranting the jury's verdict. The *separate* claims consisted of accusations that Bonner had been "slipped" into the post as Executive Secretary of the Power Commission by certain power interests; that he had taken letters from the official files showing those who recommended him for the position; that, he had violated his duty as an officer of the United States; and, that because of the above matters, he had been eliminated as a delegate to a World Power Conference for which he had been previously selected. It is conceded that there can be no question as to the libelous quality of the words charging an attempt to steal official letters, but the court also held the four remaining publications, which did *not charge a crime,* to be libelous *per se,* on the grounds that they held plaintiff up to ridicule, hatred and contempt.

Certainly if the charges in the *Bonner* case, *and each of them,* were sufficient to satisfy the requirements for a libel *per se,* then how much the more so are the charges contained in case at bar?

Even a cursory examination of the decision in the *Bonner* case, heard before a *full bench* of the Court of Appeals, illustrates at once the correctness and soundness of the court's reasoning, particularly so when placed in contrast to the instant case. Mr. Justice Stephens, speaking for the court in the *Bonner* case, specifically singled out the case of *Coleman* v. *McLennan,* 78 Kan. 711, 98 Pac. 281 (which the court in its decision herein cited for authority), as the leading decision representing a *minority view* in holding that fair comment of public officials may extend to misstatements of fact. In refusing to follow such a view, Mr. Justice Stephens said:

> "But the great weight of authority in the state courts, and the rule in the Federal courts, is to the contrary—that the right of fair comment *does not extend to misstatements of fact.* More than a score of the state courts take this view." (Italics supplied.)

He cites and quotes with approval from Mr. Justice Holmes' opinion in *Burt* v. *Advertiser Newspaper Co.*, 154 Mass. 238, 28 N. E. 1*, and Judge Taft's (later Chief Justice of this Court) opinion in *Post Publishing Co.* v. *Hallam*, (C. C. A.), 59 F. 539, and observed that the rule was quoted with approval in *Russel* v. *Washington Post Co.*, 31 App. D. C. 277; in *Ashford* v. *Evening Star Newspaper Co.*, 41 App. D. C. 395; and in *A. S. Abell Co.* v. *Ingham*, 43 App. D. C. 582, the Court of Appeals applied the rule. He states that in the *Ingham* case "the contrary view was not seriously urged, and we did not discuss the authorities; hence we have in the instant case considered the question anew and have examined with care the leading cases, including those cited by the defendant, and we feel constrained to follow the majority rule as the better view."

Notwithstanding the thorough consideration given to the question of libels on public officials by a full Bench of the Court of Appeals in the *Bonner* case, the court predicated its opinion in the instant case on a decision not only *not involving a public official*, but one which it is submitted is not in the remotest manner analogous to the facts herein presented.

The plaintiff in *Sullivan* v. *Meyer*, 67 App. D. C. 228, which the Court of Appeals held "more than covers the present case," was a private individual who had injected himself into a controversy relative to the use, in the public schools of the District of Columbia, of textbooks which he alleged contained Communistic teachings. The defendant merely published *comment* relating to the merits of the plaintiff's contentions before the School Board, and asserted that they were "farcical". The *facts upon which the comment was based were concededly true.* But, Sullivan's action was not predicated on the *facts*, but on the *comment*

* The Court of Appeals in the case at Bar cites as authority for its erroneous position the earlier case of *Sillars* v. *Collier*, 151 Mass. 50, 23 N. E. 732, (R. 19n), which is not only not in point, but in view of the later decision in the *Burt* case, it is not the law of Massachusetts.

and criticism that legitimtely flowed from the facts. Consequently, the decision followed the well established rule that comment and criticism, though false, is not actionable *per se,* when based on facts truly stated.

In the instant case there are no *facts truly stated,* in reference to Representative Sweeney, and it is conceded that the charges directed at him were *false.* The difference between the two cases is more than obvious. See *Washington Times Co.* v. *Bonner,* 66 App. D. C. 280, *A. S. Abell Co.* v. *Ingham,* 43 App. D. C. 582; *Ashford* v. *Evening Star Newspaper Co.,* 41 App. D. C. 395; *Russel* v. *Washington Post Co.,* 31 App. D. C. 277; all holding that comment and criticism does not extend to false statements of fact.

Moreover, the Court of Appeals in the *Sullivan* case stated:

> "In the present case the plaintiff had patriotically sought to have eliminated from the public schools textbooks containing what he regarded as anti-patriotic or pro-communistic matter—a highly commendable effort on his part."

It surely cannot be the view of the Court of Appeals or of any court under which an enlightened people live, that Representative Sweeney's alleged opposition to Mr. Freed because the latter was a Jew, constituted a "patriotic" gesture, or was "a highly commendable effort on his part"; nor can we accede to the court's view that the *Sullivan* case "more than covers the present case."

(b) The rule stated by the Supreme Court.

The decision of the Court of Appeals runs directly counter to the decision of this Court in *White* v. *Nicholls, et al.,* 44 U. S. 266, in which both the American and English authorities, as applicable to public officials, were exhaustively examined. While it is true that the plaintiff, in the *White* case had been removed from office as Collector of Customs in the District of Columbia, the principles expounded in

the decision are eminently applicable to the case at bar.* Mr. Justice Daniel, in speaking for this Court, said (page 285):

> "How far, under an alleged right to examine into the fitness and qualifications of men who are either in office or are applicants for office—or, how far, under the obligation of a supposed duty to arraign such men either at the bar of their immediate superior, or that of public opinion, their reputation, their acts, their motives or feelings may be assailed with impunity—how far that law, designed for the protection of all, has placed a certain class of citizens without the pale of its protection? The necessity for an exclusion like this, it will be admitted by all, must indeed be very strong to justify it; *it will never be recognized for trivial reasons, much less upon those that may be simulated or unworthy.* If we look to the position of men in common life, we see the law drawing providently around them every security for their safety and their peace. It not only forbids the imputation to an individual of acts which are criminal and would subject him to penal infliction; but, regarding man as a sympathetic and social creature, it will sometimes take cognizance of injuries affecting him exclusively in that character. It will accordingly give a claim to redress to him who shall be charged with what is calculated to exclude him from social intercourse; as, for instance, with being the subject of an infectious, loathsome, and incurable disease. The principle of the law always implying injury, wherever the object or effect is the exposure of the accused to criminal punishment or to degradation in society. These guardian provisions of the law, designed, as we have said, for the

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* The Court of Appeals in the instant case suggested but did not decide that petitioner "might be entitled to relief" if he had lost his seat in Congress (R. 19). The shallowness of such reasoning may readily be seen from the fact that the statute of limitations in libel actions in this jurisdiction is *one year* [District of Columbia Code, Title 24, Ch. 12, Sec. 341 (1929 Ed.)], whereas a term in Congress runs two years. As the decision is applicable to all public officials, the general impossibility of such a showing in the matter of United States Senators having a term of six years is even more obvious!

security and peace of persons in the ordinary walks of private live, *appear in some respects to be extended still farther in relation to persons invested with official trusts.* Thus it is said that words not otherwise actionable may form the basis of an action when spoken of a party in respect of his office, profession or business. (*Ayston* v. *Blagrave,* Strange, 617, and 2 Ld. Raym., 1369). Again, in *Lumby* v. *Allday* (1 Crompt. & Jarv., 301), where words are spoken of a person in an office of profit, which have a natural tendency to occasion the loss of such office, or which impute misconduct in it, they are actionable. And this principle embraces all temporal offices of profit or trust, without limitation." (Italics supplied.)

And in reversing the Circuit Court for the District of Columbia, this Court concluded: (page 291)

"The investigation has conducted us to the following conclusions, which we propound as the law applicable thereto: 1. That every publication, either by writing, printing, or pictures, which charges upon or imputes to any person that which renders him liable to punishment, or which is calculated to make him infamous, or odious, or ridiculous, is *prima facie* a libel, and implies malice in the author and publisher towards the person concerning whom such publication is made. Proof of malice, therefore, in the cases just described, can never be required of the party complaining beyond the proof of the publication itself; justification, excuse, or extenuation, if either can be shown, must proceed from the defendant. 2. That the description of cases recognized as privileged communications, must be understood as exceptions to the rule, and as being founded upon some apparently recognized obligation or motive, legal, moral, or social, which may fairly be presumed to have led to the publication, and therefore *prima facie* relieves it from that just implication from which the general rule of the law is deduced. The rule of evidence, as to such cases, is accordingly so far changed as to impose it on the plaintiff to remove those presumptions flowing from the seeming obligations and situation of the parties, and to require of him to bring home to the defendant the existence of malice as the true mo-

tive of his conduct. Beyond this extent no presumption can be permitted to operate, much less be made to sanctify the indulgence of malice, however wicked, however express, under the protection of legal forms. We conclude, then, that malice may be proved, though alleged to have existed in the proceedings before a court, or legislative body, or any other tribunal or authority, although such court, legislative body, or other tribunal, may have been the appropriate authority for redressing the grievance represented to it; and that proof of express malice in any written publication, petition, or proceeding, addressed to such tribunal, will render that publication, petition, or proceeding, libelous in its character, and actionable, and will subject the author and publisher thereof to all the consequences of libel. And we think that in every case of a proceeding like those just enumerated, *falsehood and the absence of probable cause will amount to proof of malice.*"* (*Italics supplied)

(c) The English rule directly in accord with Petitioner's contentions.

A shown under Point I(a) herein, the publication accused petitioner in unambiguous terms of religious and racial intolerance in connection with his official duties as a Representative in Congress. It charged that the basis of his opposition to a qualified appointee for judicial office was the fact that the candidate was of Jewish origin. There can be no mistake, but that the article held petitioner out as being—what the general public points to—a "Jew-hater". A search of the American authorities fails to disclose, at least until the present litigation, a precedent involving the exact charge. However, the Court of Appeal in England recently passed on a case which seems to be squarely in point. The case is *De Stempel* v. *Dunkels*, (1938), 1 All. E. R. 238, 54 T. L. R. 289, and involved the charge of being a "Jew-hater."

The action was for slander and breach of contract. Plaintiff, Baron Victor De Stempel, was married to the stepdaughter of the defendant, Walter Dunkels, a member of the

Jewish faith. The defendant was a member and leading director of the Diamond Corporation of England, and his cousin Otto Dunkels, the employer of the plaintiff, was head of the Corporation. Differences arose between the plaintiff and his wife (Walter Dunkel's stepdaughter), ultimately resulting in the defendant lodging accusations against plaintiff with Otto Dunkels. Among the charges made was "Victor is a Jew-hater." For our purposes here, this need be the only accusation considered.

At the trial, the jury found the statement "Victor is a Jew-hater" to be defamatory and awarded damages.

When the trial judge overruled the verdict, the Court of Appeal held that to say "Victor is a Jew-hater" was defamatory *per se* and special damages need not be pleaded, or shown. (It is interesting to note that defendant's counsel, while he differed on other points observed that he "could not contend that the words, 'Victor is a Jew-hater' were not capable of a defamatory meaning.").

While dissenting on certain issues of the case, Slesser, L. J., indicated his accord with the holding that the words complained of were defamatory *per se,* when he said:

> "As to this alleged slander, Sir Patrick Hastings (def's. counsel) admitted that, in the primary sense, it was capable of a defamatory meaning. He said that he was constrained to agree with the view, which I had expressed during the argument, that to say of any man that he was a 'hater' of any person or class of persons was capable of a defamatory meaning. Hatred of anything but wickedness may well be considered to be a vice or a sin. In the Litany where a public recognition of morality and social obligation may properly be sought, there is prayer for delivery from hatred, malice, and all uncharitableness, and, in a Christian country such as England, to say that a man is possessed of hatred is, in my opinion, 'likely to tend to lower him in the estimation of right-thinking members of society generally,' to quote the test mentioned by Lord Atkin in Sim v. Stretch (1936, 2 All. E. R. 1237). In Ireland it has been held defamatory to say of a man that he is intolerant:

Teacy v. McKenna (1869, I. R. 4 C. L. 374). In New Zealand, it has been held defamatory to say of a man that he has been guilty of unbrotherly conduct: Campbell v. Payton (1889, 17 N. Z. L. R. 91). I would add to the category the statement that a man is afflicted by hatred."

On the same question, Scott, L. J., stated:

"I deal first with the slander alleged in para. 7 of the statement of claim: 'Victor is a Jew-hater.' Sir Patrick Hastings (def's. counsel) felt himself unable to argue that these words were incapable of a defamatory meaning. Both the senior members of the court agree with Sir Patrick, and so do I. *The words seem to me obviously defamatory.* To say that a man hates a particular race or class of people is to allege, at the very least, a character which is warped and unlikely to be impartial." (Italics supplied.)

It is worthy to note that the *De Stempel* case involved but a charge of slander, whereas in the case at bar the disgraceful charges have been given permanence in print. The distinction marking libel as greater of the two evils, referred to in Point II herein, makes the above case an *a fortiori* one in support of petitioner's contentions.

It seems inconceivable that the capital city of a great democracy, with a Jewish population of over four and a half millions is, on the one hand offering succor and assistance to the oppressed of all lands, of all creeds and races, and on the other extending judicial license to the propagators of false statements charging a reputable public official with religious and racial hatred.*

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* According to the "Jewish Statistical Bureau of Synagogues of America" (1937), the Jewish population in the United States is 4,770,647; whereas in England the Jewish population is only slightly in excess of 300,000.

CONCLUSION.

Although this is a controversy between private parties, the questions involved are most important, and in our opinion, should be settled by the Supreme Court.

Your petitioner therefore, prays that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia, in order that the case may be subject of review and determination by this Court, and the judgment of the lower courts be reversed.

Respectfully submitted,

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WILLIAM F. CUSICK,

Of Counsel.